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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAVID EDWARD ALBERT, Defendant and Appellant.	B246528 (Los Angeles County Super. Ct. No. YA078696)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed in part and reversed in part with directions.

J. Kahn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Tannaz Kouhpainezhad, for Plaintiff and Respondent.

Appellant David Edward Albert was convicted of the murder of his former employer, arson of his former place of employment and animal cruelty (his employer's dog died in the fire). He maintains that his convictions should be reversed because the trial court erroneously admitted unduly prejudicial evidence of "offhand" remarks appellant made to two witnesses that someone would blow up or burn the place. Appellant also contends his conviction for animal cruelty must be reversed because the jury was erroneously instructed as to a crime that requires proof of specific intent, and that, in any event, there was insufficient evidence to support a conviction for cruelty to animals. We conclude the trial court did not err in admitting appellant's out-of-court statements threatening to bomb or burn the place down. We also conclude that reversal of the conviction for animal cruelty—a general intent crime—is required because the jury was improperly instructed as to the elements of a crime appellant was not alleged to have committed (Pen. Code, § 597a).[1] Remand is necessary as the record contains sufficient evidence upon which a jury could reasonably find appellant committed an act of animal cruelty in violation of the appropriate statute (§ 597, subd. (a): that is, section 597, subdivision (a) as opposed to section 597a. We also remand for correction of the abstract of judgment.

PROCEDURAL BACKGROUND

A three-count information charged appellant with first degree murder (§187, subd. (a); count 1), arson (§ 451, subd. (c); count 2), and cruelty to an animal (§ 597, subd. (a); count 3). As to count 1, the information alleged personal-use firearm allegations (§ 12022.53, subds. (b)–(d)).

Appellant pleaded not guilty. A jury found him guilty on all counts, and found the firearm allegations true. Appellant was sentenced to a total of 56 years eight months to life, plus life. As to count 1, he was sentenced to 25 years to life, plus 25 years to life for the section 12022.53, subdivision (d) firearm allegation; the remaining firearm allegations were stayed. (§ 654.) As to the counts for arson and cruelty to an animal,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

appellant was sentenced to six years and eight months, respectively. The sentences for counts 1 and 3 were to run consecutive to the sentence for count 2. Appellant was ordered to pay various fees and fines, and awarded presentence custody credits.

FACTUAL BACKGROUND

Prosecution case

In July 2010,[2] John Lavine owned "Passive Arts" (the club), a fetish role-playing business, on La Cienega Boulevard in Los Angeles. The club was not licensed to serve alcohol. Appellant worked for Lavine; he performed janitorial services and sometimes worked as a bouncer at the club. Lavine owned a mixed breed wolf dog named "Koda," whom he routinely brought to work. Koda was very protective of Lavine but also an agreeable dog who displayed aggression only if he thought someone he cared about was being attacked. Lavine kept Koda in his unlocked office during business hours so the dog would not frighten the club's clients. Lavine's daughter testified that Koda was a "sweet" animal who never attacked anyone, but said he could get aggressive to protect Lavine.

Alyssa Stafford worked at the club as a performer and receptionist; she is also appellant's friend. On Saturday nights the club—ordinarily open to the public—was rented out for private "swinger" parties. Stafford testified that appellant sometimes worked at the swinger parties as a janitor and bouncer. When cleaning, appellant used rubbing alcohol to disinfect equipment and furniture in the rooms after each session, and the entire venue after swinger parties. Large (bulk) containers of rubbing alcohol were stored near the lobby, and spray bottles of rubbing alcohol were scattered throughout the club. Stafford testified that in addition to working at the club, appellant socialized outside of work with some female employees and engaged in sessions with some women to satisfy his own fetishes.

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[2] Further date references are to calendar year 2010.

On the Saturday before the fire, Lavine left a message telling appellant he no longer wanted him to come in for the swinger parties. Stafford testified that this information upset appellant, who appeared nervous and anxious, although he repeatedly told her he did not understand why it bothered him so much. He acknowledged that it was not a big deal since he could still hang out with the women, and was only barred from working the parties.

Katherine Carranza was employed as a performer at the club in 2010. Carranza testified that toward the end of her employment at the club, she and the other women who worked there were treated unfairly by Lavine. He did not pay them on time, and was angry and yelled at the women because things were not going according to his business plan. Sometime in June, Carranza heard appellant say something to the extent that one day someone would blow up the club or set it on fire. Lavine was not present when appellant said this; it was said in the presence of a small group of employees who were angry because Lavine had not paid them on time.

Andrew Estronick had attended Saturday night parties for several years at the club. He had often spoken with appellant over the years. About three or four weeks before the fire, Estronick was in the building lobby. Appellant was sitting in the same area when Lavine walked through. Estronick heard Lavine tell appellant, "'I'll pay half,'" to which appellant responded, several times, "'I'll burn the place down.'" Estronick could not tell if appellant was joking.

Lori Struble worked at the club as a performer, receptionist, bartender, and bookkeeper. A few days before the fire, appellant told Struble that Lavine said the people at the swinger parties did not want appellant there because he stared at them and was creeping them out. Appellant seemed upset by this information. The day before the fire, appellant, who had recently been diagnosed with cancer, told Struble he was sick and depressed. But, he also said his life was good, and he would feel better soon. Struble's job duties included closing up at night. Candles had been burned at the club the night before the fire, but none remained lit when she closed up at midnight. Struble made sure the lights were out, the rooms were in proper order, the trash was emptied, the alarm

was set and the doors were locked. There was no evidence of a fire, nor of any fire hazard.

Surveillance videotape reviewed later revealed that on July 27, Lavine arrived at the club at 10:34 a.m. A few minutes later, appellant's car was seen driving down the alley to a parking lot north of the club. At 10:50 a.m., Jeffrey Soule, the club's handyman, drove up and parked his truck next to Lavine's SUV. Soule needed a phone number from Lavine, and decided to stop by the club to get it. He walked up to the front door, which was locked, and knocked. Koda barked, and Soule told the dog, "'Shut up, Koda.'" The front of the club had a blacked-out window; the only way to see inside was to peer through an airflow vent. Soule noticed the slot in the door being slapped shut, and hit the buzzer to be let inside. Someone inside said, "'Go away. We're not open yet. Come back later.'" Soule was at least 65 percent certain that the voice he heard was appellant's. He did not believe it was Lavine, because Lavine had needed Soule to install a phone line. Soule also noticed that Lavine had left a message on his cell phone at 10:47 a.m.; Lavine's voice sounded normal to Soule. Soule left about five minutes after he arrived.

Los Angeles County Sheriff's Department Detective Joseph Garcia arrived at the club to investigate a fire in progress. Smoke billowed from the building and fire trucks had not yet arrived. In the course of his investigation, Detective Garcia learned that surveillance video from a nearby business had recorded "interesting action" that had taken place about the time the fire started.[3] The video showed a small door open on the

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[3] Detective Garcia obtained the surveillance video from nearby businesses. A DVD was made, amalgamating surveillance footage from two businesses at La Cienega in the early morning hours of July 27, 2010. The parties stipulated that nothing was added to or deleted from the footage. The video shows that Lavine parked his truck in front of the club at about 10:30 a.m., and took his dog out. Three minutes later, a silver Honda similar to appellant's car drove north on La Cienega Boulevard. The video shows Soule's truck parked next to Lavine's, and subsequently shows Soule's truck leaving the parking area and a person then heading from the alley or parking lot toward La Cienega.

side of the club building. An older, somewhat stocky man in a red shirt came out the door and walked down the alley. No one else left the building.

When Detective Angelo Lopez arrived at the scene, he saw appellant sitting on the ground in the bushes. The man, later identified as appellant, appeared injured and had black soot on his face and clothes. Detective Lopez asked appellant if he had been in the fire. Appellant said he had not, but had been struck by a car at 104th Street, about one quarter of a mile away, and walked over to seek help after seeing the fire trucks. The detective noticed abrasions on one of appellant's hands which did not appear to be consistent with injuries one would incur by being hit by a car.

A paramedic at the scene assessed appellant's injuries after being told he may have been hit by a car and needed aid. Appellant complained only about pain in his right hand, which he attributed to having been hit by a car 500 feet away, and denied any involvement with the fire. The paramedic testified that soot on appellant's clothing and face, and singeing of his nasal passages suggested otherwise. He also testified that puncture wounds on appellant's hand were consistent with having been bit by an animal, not being struck by a car, which would have caused bruising and swelling. Appellant's body had not experienced a blunt force injury.

When Carranza arrived at the club for work, she saw appellant on a gurney about to be put into an ambulance. She told Detective Lopez that appellant worked at the club and was usually there at that time. Detective Lopez's suspicions were aroused, and he detained appellant.

The front door of the club was barricaded from the inside. When Detective Lopez entered the club with a fire investigator they found the body of a man later identified as Lavine behind a desk in the front office. Koda was also found dead in a corner of the office. Deputy Michael Cofield, an expert in the field of fire origin, testified that humans

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The person is obstructed by smoke from the fire. The same person then appears in the video on La Cienega. The person resembled appellant at the time of the incident.

and animals can die due to smoke inhalation without being burned, because smoke is toxic at certain levels. They can also die because when they take a breath, the super-heated air can cause traumatic injury to the body, causing the throat to close down, and the body to pour fluid into the burned lungs, effectively drowning them.

Based on the evidence, Deputy Cofield opined that Lavine had been sitting in the chair behind the desk, fell backwards and pinned the back of the chair under his upper torso. Based on the burn patterns, Deputy Cofield suspected alcohol had been used as an accelerant, and instructed the crime lab to test the area.[4] Isopropyl alcohol was also found on the carpet and pad found under Lavine's body. Ultimately, based on his observations at the club, Deputy Cofield opined that the fire had intentionally been started with flammable liquid, probably alcohol, on top of Lavine's dead body, inside the building. Deputy Cofield also found the remains of a dog at the scene, and a .22-caliber gun with casings inside, but without a barrel, melted on top of the desk; the barrel was on the ground directly below the gun. The bullets later recovered from Lavine's body were fired from the gun found in the fire. Stafford testified that Lavine did not have guns, and she had never seen one at the club. Deputy Cofield accompanied appellant to the hospital. Appellant had blood on his knuckles, near a fingernail and on his shirt and slacks. Deputy Cofield bagged appellant's clothing.

Amber Sage, a senior criminalist found a fired cartridge case in a front pocket of appellant's slacks. Sage tested three bloodstains from appellant's red shirt, and two from his slacks, and determined that the DNA profile from the stains was a mixture of two contributors. Sage also tested blood found on a doorjamb, and determined appellant was the source of that bloodstain.

Dr. Vadims Poukens, the deputy medical examiner who performed an autopsy on Lavine, testified that he died of multiple gunshot wounds, but there was also evidence of strangulation. Dr. Poukens was unable to determine the number of entrance wounds

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[4] A criminalist tested debris from the fire and determined that it contained rubbing alcohol that matched the canisters of rubbing alcohol in the club.

because of the state of Lavine's burned body, but was able to find eight projectiles, five of which were recovered from the head and neck area. The fatal wound was a shot through Lavine's brain, which caused it to hemorrhage. Lavine was dead by the time the fire started. He suffered no smoke inhalation; there was no evidence of soot in his trachea and bronchia, and his carbon monoxide levels were low. Dr. Poukens also examined Koda, whose toxicology report showed the dog died due to smoke inhalation.

A veterinarian, Dr. Ben Alegado, performed a necropsy on Koda's body. The dog's injuries included blood oozing from his mouth area and numerous lesions. The lining of his trachea was riddled with soot and visible carbon particles, and there were hemorrhages throughout the dog's windpipe, including smaller branches of the windpipe extending to the lung. Based on his experience, education, training and the evidence, particularly the carbon deposits, hemorrhages and changes in the dog's lungs that were inconsistent with disease, Dr. Alegado concluded Koda died of suffocation. There was no sign of any other fatal injury.

Defense case

Appellant testified on his own behalf. In April he was diagnosed with rectal cancer, and suffered depression as a result. Appellant began working for Lavine at Passive Arts in 2001. He performed most of his daily duties in exchange for "having fun with the girls," but he was paid to help at the Saturday night parties. During the years he worked at the club appellant had seen lit candles out around the club, and had seen bottles of rubbing alcohol left all over the club by the women who worked there.

On July 25 appellant was on his way to the club when Lavine called and left a message saying he did not want appellant for that evening's party. When appellant called Lavine to find out why, Lavine explained that the organizers of the Saturday night swinger parties felt appellant was not "aesthetically pleasing," and did not want him to work the parties anymore.

Appellant went to the club the next day. Lavine confronted appellant about Andrea Smith, one of Lavine's employees who was living in appellant's home. Appellant explained that it had nothing to do with the club, and that he just rented her a

room. When appellant went back to the club on Monday, he and Lavine had a confrontation and Lavine told him not to come back to the club. Appellant was devastated. He had had so much fun at the club with the women, the interactions had been "incredible," and "now it was going to be gone forever."

On Tuesday, appellant went to the club to talk to Lavine because he was depressed and suicidal. He planned to tell Lavine to let him come back to work at the club, or appellant would "blow [his] brains out right in front of [Lavine]." Appellant took a loaded small-caliber gun with him. He had had the gun for over 20 years, and did not take it with him intending to kill Lavine. As he was looking for Lavine, appellant heard Soule trying to get in the building. Appellant told Soule he needed to talk to Lavine, and to come back later. Appellant knew Soule was nosey, so he put the metal slot down to prevent him from seeing inside.

Appellant found Lavine who told him he had made up his mind, but would give appellant a couple of minutes to talk. Lavine put Koda in his office, closed the door and sat at a desk in the lobby. Appellant stood in the doorway and talked to him. He explained to Lavine how important the club and the women that worked there were to him. He said he did not care about the money; it was a place he went to have fun, and he wanted to come back. Lavine said he had made his decision, and appellant could not come back. Appellant became depressed. He was also upset because he had been coming to the club for nine years, and felt it was being taken away from him for "no good reason." He pulled his gun out and said if Lavine did not let him come back he would kill himself. Lavine just looked at appellant. When appellant realized Lavine would not respond, he turned to go. As he did, he threatened to call the alcohol licensing "people" to report the illegal liquor Lavine had served in the club for nine years, even though it lacked a liquor license. Lavine became enraged, and jumped on appellant. A struggle ensued and Lavine kept hitting appellant and trying to get his gun. The gun went off six times during the struggle.

Four candles were lit in the lobby, in which long curtains were hung. There was also a plastic dispenser containing alcohol. During the struggle between appellant and

Lavine, a candle on the desk was knocked over. It lit the curtains, and the alcohol bottle blew up three feet from Lavine. Appellant tried to help Lavine up, but realized he had "expired." Appellant ran to the office door to let Koda out, but the door was on fire and he could not open it. He went out the side door, disoriented and in shock. He crossed the street and sat down in a clearing near some bushes. He lied to police because of his disorientation and shock.

Appellant's hand was injured during the struggle with Lavine. Koda did not bite appellant. Appellant never intended to kill Lavine and felt that his life was in danger when he and Lavine struggled for possession of the gun. Appellant never meant to set the building on fire or to kill Koda. He has two cats and loves animals. Appellant often took Koda for walks and gave him treats.

Vanilla Neulan testified. She had a business relationship and was friends with appellant. Neulan testified that appellant was very submissive, compliant and not violent or dishonest. She knew he suffered from diabetes and had been diagnosed with cancer. Neulan testified that appellant loved animals and had cats and dogs. Neulan's dog loved appellant, who sometimes looked after her pets.

Smith, who met appellant at the club when she worked there, was his tenant. She also testified that appellant was a submissive, nonviolent and nonangry person. Smith knew appellant suffered from diabetes, hypertension and rectal cancer. Appellant took treats to work for Koda, occasionally walked him, or just watched over him as needed. He spoiled Smith's dog.

Rebuttal evidence

Appellant never told Smith that Lavine was unhappy that she lived with him. Lavine's daughter had been at the club on more than 20 mornings; candles had never been lit at that time of day.

DISCUSSION

1. Admission of appellant's out-of-court statements threatening to set the club on fire.

Before trial, appellant moved to exclude evidence by witnesses Estronick and Carranza regarding what he contends were simply offhand remarks, or jokes that he made that someone would blow up or burn down the club, on the ground the remarks were unduly prejudicial. On appeal, he argues the statements are inadmissible hearsay which fail to satisfy the declarant's state of mind exception to the hearsay rule under Evidence Code section 1250, and their introduction constituted prejudicial error. He claims the statements were simply generic threat evidence, by which he was prejudiced because they are the only evidence of any premeditation or intent to kill. The Attorney General contends that appellant forfeited this claim by failing to make a hearsay objection at trial, and by expressly withdrawing his objections to Carranza's testimony. The Attorney General also argues that appellant's assertion lacks merit because the statements are admissible under Evidence Code section 1220, as admissions of a party opponent.

a. Procedural background

i. Estronick

The court based its ruling on the admissibility of appellant's statement to Estronick on Estronick's preliminary hearing testimony, and argument by counsel. Estronick acknowledged that he did not know if appellant was joking when he overheard him twice tell Lavine he would "burn the place down," after Lavine said he planned to cut appellant's pay in half. But the prosecutor noted that Estronick testified at the preliminary hearing that appellant had not been smiling or laughing when he made the statements, and did not seem to be joking. Estronick had not known what to make of the statements, but felt compelled to report them to the police immediately after the fire. The prosecutor argued the statements were more than mere coincidence or happenstance, particularly as they were made in the context of appellant's and other employees' concern that they weren't being paid on time, and the fact, which clearly had upset appellant, that he was being excluded from the swinger parties. Appellant reminded the court that

Estronick testified that he could not discern whether appellant made the statements in jest, and argued that their introduction would be more prejudicial than probative.

The court found the statements overheard by Estronick admissible. It observed:

"I just don't see how this is a joke. . . . I guess maybe people can joke about burning a place down. I haven't heard anyone in my whole life joke about burning a place down. I don't really see it as much of a joke. . . . I think it is a declaration against interest. I'm going to allow the People to use it. I think it is another piece of circumstantial evidence in the case, and I will allow it to be used."

ii. Carranza

An Evidence Code section 402 hearing was conducted to determine the admissibility of Carranza's statement. She testified that while employed by the club in June 2010, she heard appellant threaten the business by saying something to the effect that "somebody's going to blow up or burn the business down." Appellant had not laughed when he made the statement. It was said in the context of an "angry rant" among a small group of employees who felt mistreated by Lavine and were complaining about not being paid on time.

After cross-examining Carranza, appellant's counsel withdrew his objection to her testimony. The court agreed the evidence was admissible, stating "it's appropriate that the individual that works with the flammable liquid makes a comment about the place burning down. I'll certainly allow it."

b. Analysis

The Attorney General argues that appellant waived his claim of error based on admission of Carranza's testimony by withdrawing his objection to her testimony at trial. Appellant, appropriately, does not take issue with this contention. Appellant's counsel "expressly withdrew his objections to the introduction of the evidence. Therefore, [appellant] has waived this issue on appeal." (*People v. Jones* (2003) 29 Cal.4th 1229, 1255; see also *People v. Robertson* (1989) 48 Cal.3d 18, 44 ["Defendant, having withdrawn his objection to the evidence, cannot now complain of its admission"].)

Appellant also forfeited hearsay-based challenges to Carranza's and Estronick's testimony regarding his statements by failing to object on those grounds at trial. "'"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal. [Citation.]'" [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 620; *People v. Partida* (2005) 37 Cal.4th 428, 433–435; Evid. Code, § 353, subd. (a).) Appellant may not assert a hearsay objection for the first time on appeal.

In any event, as the trial court readily recognized, appellant's statements to Carranza and Estronick were admissible under Evidence Code section 1220,[5] a hearsay exception for a party's declarations against interest. "The hearsay rule does not bar statements when offered against the declarant in an action in which the declarant is a party." (*People v. Horning* (2004) 34 Cal.4th 871, 898.) Evidence Code section 1220 is broadly construed and "covers all statements of a party, whether or not they might otherwise be characterized as admissions." (*Horning*, at p. 898, fn. 5; see also *People v. Carpenter* (1999) 21 Cal.4th 1016, 1049 ["The evidence was of statements, defendant was the declarant, the statements were offered against him, and he was a party to the action. Accordingly, the hearsay rule does not make the statements inadmissible."].)

As the trial court found with regard to Estronick, and as is also true as to Carranza, appellant's statements to these witnesses were admissions made by a party declarant, and properly admissible under Evidence Code section 1220. Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party. (*People v. Horning*, *supra*, 34 Cal.4th at p. 898.) Appellant did not object when the court ruled on the basis of this exception at trial, nor does he address the Attorney General's arguments regarding the propriety of that ruling on appeal.

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[5] Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ."

Appellant's only assertion of error on appeal is that the virtually identical statements made to or in front of Carranza and Estronick were inadmissible to prove his state of mind under Evidence Code section 1250, subdivision (a), and unduly prejudicial under Evidence Code section 352. Relying on *People v. Karis* (1988) 46 Cal.3d 612 (*Karis*), appellant maintains that his "offhand remark . . . when blowing off steam with co-workers three weeks before the killing, was not admissible under [Evidence Code] sections 1250 or 352" because "the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense." (*Id.* at p. 637.)

Karis, *supra*, 46 Cal.3d 612 does not assist appellant. In *Karis*, a defendant convicted of murder and rape, challenged the admissibility of his statement to a friend that he would not hesitate to eliminate witnesses if he committed a crime. He argued the statement should have been excluded because there was no showing it was made under circumstances indicating its trustworthiness. It did not reflect intent to commit a crime and, as a result, the state-of-mind hearsay exception was unavailable, and the statement was unduly prejudicial. (*Id.* at pp. 636–637.) The Supreme Court found the statement admissible. Nothing suggested it was made in circumstances indicating a lack of trustworthiness and it was highly probative. The statement was made during a social visit to a friend during which defendant had no motive to lie or exaggerate, and in which he was under no compulsion to speak. "As evidence of motive, it could be circumstantial evidence of identity. It could also be circumstantial evidence that when he shot [the victims], he intended to kill, harbored malice, and killed . . . with deliberation and premeditation." (*Id.* at p. 636.) The court also found the statement was not unduly prejudicial because its probative value was so high, especially given that the statement was made just three days before the crime was committed. (*Id.* at p. 637.)

Karis, *supra*, 46 Cal.3d 612 cautioned that a threat of future harm has "as great a potential for prejudice in suggesting a propensity to commit crime as evidence of other crimes," a purpose for which such evidence is not admissible. (*Id.* at p. 636.) "Therefore, the content of and circumstances in which such statements are made must be

carefully examined both in determining whether the statements fall within the state-of-mind [hearsay] exception, as circumstantial evidence that defendant acted in accordance with his stated intent, and in assessing whether the probative value of the evidence outweighs that potential prejudicial effect." (*Ibid*.) However, where the evidence shows the victim comes within the scope of a previous threat, it is generally admissible "unless the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense." (*Id*. at p. 637.)

Here, Estronick overheard appellant twice tell Lavine, "I'll burn the place down," a few weeks before the fire. Around the same time, appellant suggested to Carranza that one day someone would get fed up and blow "the place up" or set it on fire. Immediately after Lavine rejected appellant's plea to be allowed to return to the club, he was shot to death, and the business was immediately set ablaze. The pivotal issue at trial was whether appellant intended to kill Lavine with malice aforethought and set the fire or, whether, as appellant testified, the shooting and fire were accidental. The jury could reasonably have inferred from the circumstances at the time and appellant's statements, that he bore significant animus toward Lavine, who was determined to keep him away from the club, an important part of appellant's life at the time of the killing and the fire.

This factual scenario lends support to the conclusion that appellant acted with malice aforethought, and casts significant doubt on his claim that the shooting and fire were accidental. His statements to these witnesses were highly relevant to show his consistent intent and motive on the day he shot Lavine and set fire to the club, and tended to prove that he acted in accordance with that state of mind. Reasonable minds could infer that appellant's statements reflected his anger at and animus leading up to his final meeting with Lavine and at the time of the killing and fire, which also tends to establish that he acted with malice aforethought.

We do not doubt that appellant was prejudiced by the court's decision to admit testimony regarding his remarks about someone blowing up or burning down the club. But, under Evidence Code section 352, "'"prejudicial" is not synonymous with

"damaging."'" (*Karis*, *supra*, 46 Cal.3d at p. 638.) "'[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual *and which has very little effect on the issues*.'" (*Ibid*., italics added.) We reject appellant's assertion that this evidence inflamed jurors' emotions, or motivated them to punish him based on emotional reactions. Any prejudice flowing from the statements was that which "naturally flows from relevant, highly probative evidence" bearing on the key issue of guilt, not that which results from evidence solely aimed at evoking emotional bias. (*Ibid*.) Here, "[t]he highly prejudicial nature of the evidence lay not in the fact that the jury might consider it as reflecting a propensity on [appellant's] part to commit murder, but in its value in identifying [him] as the perpetrator of the crimes and demonstrating his motive and mental state." (*Ibid*.) The evidence was probative of the pivotal contested issues of motive and intent.

2. Reversal is required as to the conviction for cruelty to animals

Appellant maintains that reversal is required as to count 3 because the jury was improperly instructed with CALJIC No. 16.325. Specifically, he asserts that reversal is in order because the court failed to define the words "'knowingly and willfully,'" the instruction lacked the word "'maliciously,'" the mental state required for a cruelty against animals conviction, and lowered the prosecution's burden of proof to prove guilt beyond a reasonable doubt. The Attorney General concedes that reversal is required, and appropriately maintains that reversal is in order because the court erroneously instructed the jury as to the elements of section 597a, a crime not alleged against appellant.

Section 597a, provides in part: "Whoever carries or causes to be carried in or upon any vehicle . . . any domestic animal in a cruel or inhuman manner, or knowingly and willfully authorizes or permits it to be subjected to unnecessary torture, suffering, or cruelty of any kind, is guilty of a misdemeanor . . . ."

Section 597, subdivision (a), the crime alleged against appellant, provides that "every person who maliciously and intentionally maims, mutilates, tortures, or wounds a

living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable [by imprisonment in a county jail] . . . ."

The trial court has a sua sponte duty to instruct the jury on the general principles of law relevant to and governing the case, including instructions as to the material elements of each charged offense. (*People v. Flood* (1998) 18 Cal.4th 470, 480–481; *People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) Instructional error relieving the prosecution of the burden of proving each element of a charged offense beyond a reasonable doubt violates the federal and state constitutions. (*Flood,* at pp. 479–480.)

Here, the trial court gave a modified instruction on section 597a, which has different elements than section 597, subdivision (a). The charged offense requires mutilation, killing, torturing or wounding, whereas a violation of section 597a may be committed simply by permitting an animal needlessly to suffer. The trial court erred in instructing on section 597a. Harmless error analysis does not apply if the trial court fails to instruct on the elements of the charged offense. (*Cummings*, *supra*, 4 Cal.4th at p. 1315.) Reversal is required as to count 3, and remand for retrial with the correct jury instructions.

3. Sufficient evidence requires remand as to the count for cruelty of animals

Appellant contends that retrial as to count 3 is improper, because section 597, subdivision (a) required proof that he acted with specific intent to kill Lavine's dog, and there is insufficient evidence to satisfy this standard. He is mistaken.

Again, section 597, subdivision (a) provides that "every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable [by imprisonment in a county jail]." Appellant argues that because the statute employs the language "maliciously and intentionally," it requires a prosecutorial showing that he acted with the specific intent to harm the animal. This argument was rejected in *People v. Alvarado* (2005) 125 Cal.App.4th 1179 (*Alvarado*), in which the Fourth District Court of Appeal, relying on *People v. Atkins* (2001) 25 Cal.4th 76, found as a matter of first impression, that section 597, subdivision (a), is a general intent statute. (*Alvarado*, at pp. 1185–

1190.) The terms "'willfully,' 'knowingly,' 'intentionally,' and 'maliciously' are expressions of general, not specific, intent when used in a penal statute. [Citations.]" (*Id.* at p. 1188.) Accordingly, to establish animal cruelty in violation of this statute, the prosecutor need only show that a defendant "'acted intentionally in engaging in the proscribed conduct.'" (*Ibid.*)

Acknowledging the majority decision in *Alvarado,* appellant invites us to adopt instead the reasoning of the concurring opinion in that case. In the concurring opinion, Justice McIntyre argued that the fact that section 597, subdivision (a) was a specific intent crime was illustrated by two facts. First, in amending section 597, subdivision (a) in 1986, the Legislature added the word "intentionally," to a statute that originally made it a crime to "maliciously" maim, mutilate, torture, wound or kill a living animal. This change suggested more than general intent was required. (See Stats. 1986, ch. 846, § 1, p. 2894.) Second, the litany of criminal acts described in the statute—i.e., "maim," "mutilate" and "torture"—inherently described end results, not just proscribed acts, thereby requiring specific intent to accomplish a stated purpose. (See *Alvarado, supra,* 125 Cal.App.4th at pp. 1191–1192 (conc. opn. of McIntyre, J).)

We reject appellant's invitation to part ways with the well-reasoned majority opinion in *Alvarado*. As the majority recognized, section 597, subdivision (a), which proscribes maliciously and intentionally maiming, mutilating, torturing, wounding or killing an animal, does not require intent to do some further act or achieve some further consequence, and thus is a general intent crime; it does not require specific intent to maim, mutilate, torture, wound or kill an animal. (*Alvarado, supra,* 125 Cal.App.4th at p. 1188.) Like the *Alvarado* majority, we are persuaded by the decision in *People v. Sargent* (1999) 19 Cal.4th 1206, in which the Supreme Court concluded that a statute criminalizing child abuse by direct assault, required a showing of general rather than specific intent. (*Sargent*, at pp. 1219–1223; accord, *Alvarado*, at p. 1188 [*Sargent* "made clear that regardless of whether the proscribed act could also in some circumstances be considered an end result, where it is used to describe the act itself and there is no purpose or result required, it is a general intent crime"].)

Viewing the evidence presented at trial in the light most favorable to the judgment, as we must (*People v. Osband* (1996) 13 Cal.4th 622, 690), we find sufficient evidence to support a conviction for animal cruelty.

The record reflects that Koda was a well-mannered, sweet dog who was very protective of Lavine and acted aggressively only if he feared someone he cared about was in danger. Appellant, a person who had taken Koda for walks and given him treats, was bitten on one hand. He claimed that after the fire began, he tried to open the office door to let Koda out, but could not because it was on fire. Evidence of the bite wound on his hand tends to negate appellant's account—if the dog was closed off in another room during appellant's exchange with Lavine, it could not have bitten appellant's hand. The jury could reasonably infer that appellant either intentionally chose to leave Koda in the burning building to die, or purposefully shut him up in the office and closed the door, knowing he could not escape. Dr. Alegado, the veterinarian who performed the necropsy on Koda, opined that the dog died from suffocation and carbon monoxide poisoning as a result of the fire. There is sufficient evidence appellant committed an act of animal cruelty.

We are not persuaded by appellant's reliance on three opinions upholding convictions under section 597, subdivision (a).[6] Appellant is correct that those cases involved vile acts of disfigurement and torture. He attempts to distinguish this case "because the dog sustained no injuries, he had not been shot, and his fur was not singed, [and] the testimony was that his death was attributable to smoke inhalation."[7] From this,

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[6] *People v. Dyer* (2002) 95 Cal.App.4th 448, 450 [dog stabbed multiple times]; *People v. Thomason* (2000) 84 Cal.App.4th 1064, 1065–1066 [defendant used heel of shoe or bare foot to crush animals, "'to the point where intestines and innards [were] torn apart and taken out of them'"]; and *People v. Speegle* (1997) 53 Cal.App.4th 1405, 1409–1410 [animals deprived of food and water so long they ultimately had to be euthanized].

[7] Ignoring the standard of review, appellant has chosen to rely on Dr. Pouken's opinion, and to ignore the contrary opinion expressed by Dr. Alegado who performed a necropsy on Koda's carcass and concluded the dog died from suffocation.

he contends that "[s]ince there was no evidence of torture, disfigurement or the infliction of a crippling injury, much less a wound, the evidence is legally insufficient to sustain [his] conviction for violating section 597, subdivision (a)." None of the cases on which appellant relies states or implies that its facts establish the minimum showing required to sustain a conviction under section 597, subdivision (a). Of course, none of the cases could reasonably do so, because sufficiency of the evidence is a fact-intensive inquiry, informed by the specific circumstances in each case. As explained above, the record contains sufficient evidence upon which a jury could reasonably conclude that appellant maliciously and intentionally killed Koda, thereby committing animal cruelty in violation of section 597, subdivision (a).

4. Abstract of judgment requires correction

An unauthorized sentence "is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6; see also *People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment"].)

Under Government Code section 70373, subdivision (a)(1), a $30 criminal conviction assessment must be imposed as to each misdemeanor or felony conviction. The Attorney General points out that the abstract of judgment incorrectly reflects a total assessment of the criminal conviction assessment of $30. The abstract of judgment shall be corrected to reflect an assessment of $30 per conviction.

DISPOSITION

David Edward Albert's conviction as to count 3, for cruelty to animals, is reversed and remanded for retrial. The superior court is directed to correct the abstract of judgment to reflect a $30 assessment pursuant to Government Code section 70373, subdivision (a)(1), per conviction. The superior court is further directed to forward a copy of the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

MILLER, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.